Scottish Law Commission

DISCUSSION PAPER No. 83

BULK GOODS:

section 16 of the sale of goods act 1979 and section 1 of the bills of lading act 1855.

AUGUST 1989

This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 31 October 1989. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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PART I - INTRODUCTION

1.1 The purpose of this paper is to elicit the views of interested organisations and individuals on two questions of commercial law. The paper is issued under the item relating to Obligations in our First Programme of Law Reform.

1.2 The background to the paper is that an approach was made to the Law Commission in England and Wales by one of the leading international commodity trade associations asking the Commission to consider examining the law relating to the rights of purchasers of goods at sea forming part of a larger bulk. This approach was prompted by a case called The Gosforth, decided according to English law by the Commercial Court in Rotterdam,[1] in which the court drew attention to the fact that section 16 of the Sale of Goods Act 1979 prevented property in unascertained goods from passing to the purchaser. Although the case decided nothing new, it gave rise to concern among commodity traders. It was one more reminder that goods purchased and paid for by them (e.g. 100 tonnes of a commodity being part of a larger bulk cargo in a particular ship) might be arrested or seized by creditors of the seller at any time before the goods were actually set apart from the bulk.

1.3 The Law Commission in England and Wales responded to this approach by sending out a questionnaire in 1987 to various trade associations for circulation to their members. Over 100 replies were received. From the replies it appeared that over 85% of the traders purchased goods which formed part of a larger bulk. It seemed that purchases afloat and on land were equally common. While the decision in The Gosforth had given rise to a certain

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[1] 20 Feb 1985 noted at [1986] LMLQ 4.

wariness in some circumstances it did not seem to have caused serious practical problems - which is not surprising as it did not alter the law in any way. Other results from the questionnaire are mentioned later.

1.4 The Law Commission then produced a Working Paper on Rights to Goods in Bulk[1] and we produced this paper. There has been full consultation between the two Commissions. We gladly acknowledge that the lead in this matter has been taken by the English Commission, that most of the research and preparatory work was done by them and that in writing this paper we have relied heavily on their Working Paper.

1.5 The English Working Paper identified two main legal problems affecting buyers of parts of bulk goods. The first problem is that section 16 of the Sale of Goods Act 1979 prevents property in unascertained goods from passing to the purchaser. This defeats commercial expectations and places purchasers at risk. The purchaser who has paid for the goods and has received documents specifying them in terms of weight or quantity finds that he does not have property rights in them and that the creditors of the seller may be preferred to him. The second problem is that the buyer may be unable to sue on a bill of lading under the Bills of Lading Act 1855 because section 1 of that Act gives him rights under the bill of lading only if property in the goods has passed to him under the bill of lading.[2] This problem is not confined to buyers of parts of bulk goods. It is a problem which arises under the 1855 Act in any case where the property in goods does not pass to the consignee or endorsee under the bill of lading. We consider later whether this is a serious problem in Scotland, given the general rules of Scots law on third party rights under

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[1] Working Paper No 112.

[2] The expression "under the bill of lading" is a simplification. The words of section 1 of the 1855 Act are set out and discussed later. See para 3.4.

contracts.[1] The English paper also notes that in the case of goods purchased while in course of carriage or in store the purchaser may have difficulty in suing on the seller's contract with an independent carrier or storekeeper in cases where there is no bill of lading but merely, for example, a delivery order.[2] Again, we consider later whether this is a problem in Scots law.

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[1] See paras 3.6 and 3.7 below.

[2] Working Paper No 112, paras 3.8 and 3.13.

PART II - SECTION 16 OF THE SALE OF GOODS ACT 1979

Section 16 and related provisions.

2.1 Section 16 of the Sale of Goods Act 1979 provides that

> "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Other provisions of the 1979 Act which are relevant to a discussion of section 16 are section 2(2) which provides that

> "There may be a contract of sale between one part owner and another"

and sections 17 and 18 which lay down rules as to when property passes. The most general rule is in section 17(1) which says that

> "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."[1]

This, of course, applies only to specific or ascertained goods. In relation to some types of unascertained goods section 18, rule 5 provides that

> "(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the

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[1] This rule, derived from the Sale of Goods Act 1893, is different from the Scottish common law rule which normally required delivery of the goods in order to pass the property. See Smith, Property Problems in Sale; Gordon, Studies in the transfer of property by traditio, p214 et seq. However, symbolic delivery (e.g. by endorsing and handing over a bill of lading) sufficed. See Bogle v Dunmore & Co (1787) M 14, 216; Buchanan v Swan (1764) M 14, 208 (a case which demonstrates a very pragmatic approach to the requirement of delivery).

seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract."

Rule 5 applies only if no different intention appears,[1] and it applies only to a contract for sale "by description".

2.2 The Sale of Goods Act 1979 defines "goods", in relation to Scotland, as including

> "all corporeal moveables except money".[2]

There is no definition of "ascertained" or "unascertained" in the Act. There is, however, a definition of "specific goods" as

> "goods identified and agreed at the time a contract of sale is made".[3]

Ascertained goods would therefore include goods which are not so identified and agreed on at the time the contract is made but are later identified and agreed on.[4]

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[1] S18 opens by saying "Unless a different intention appears, the following are rules for ascertaining the intention of parties as to the time at which the property in the goods is to pass to the buyer."

[2] S61(1).

[3] Ibid.

[4] Cf Re Wait [1927] 1 Ch 606 at p630.

The legal effect of section 16

2.3 Section 16 has the effect that if A agrees to sell 100 tonnes of barley to B, without any further specification of the barley concerned, no property in the goods is transferred to B until the goods are ascertained. This is straightforward and understandable. Section 16 has the same effect even if the 100 tonnes is part of a larger bulk which is identified in the contract - for example, 100 tonnes of barley out of the cargo in the Challenger.[1] Whether this is a necessary or convenient policy is discussed later.

2.4 Section 16 does not prevent specific goods being sold by the owner to two or more persons who will thereupon become owners in common of the goods. A table can be sold to Mr and Mrs A. A cargo of wheat or a parcel of diamonds can be sold, by means of one contract, to X, Y and Z.[2] In such cases the sale is of specific goods and section 16 simply does not come into operation. It applies only "where there is a contract for the sale of unascertained goods."

2.5 The effect of section 16 in relation to a contract for the sale of an undivided share, expressed as a fraction such as a half or a tenth, in specific goods is more difficult to determine with any

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[1] See Re Wait [1927] 1 Ch 606. The section is mandatory and applies whatever the intentions of the parties: Karlshamns Oljefabriker v East Navigation Corp [1982] 1 All E R 208 at p212. The dictum by Lord McLaren in Hayman v McLintock 1907 SC 936 at p952 to the effect that property in the unascertained goods can pass if they are covered by a bill of lading which is transferred seems to be inconsistent with section 16. See Benjamin's Sale of Goods (3rd edn 1987) para 1548 and Peter Cremer v Brinkers Groudstoffen N V [1980] 2 Lloyd's Rep 605.

[2] Cf Oppenheimer v Frazer [1907] 2 KB 50 at p76.

certainty. It is an important question. Some types of goods - such as ships,[1] racehorses[2] and household goods[3] - are quite commonly owned by two or more owners in undivided shares. Moreover some contracts of sale of parts of a bulk may be for sale of a fraction - such as half, or a tenth - of the bulk rather than for a specified quantity - such as 100 tonnes - out of the bulk. It seems clear that there can be a sale of an undivided share in goods.[4] Section 2(2) of the 1979 Act itself recognises that there can be a contract of sale between one part owner and another.[5] What is less clear is whether this is a sale of "goods".[6] On one view an undivided share in goods is an abstraction, an incorporeal notion, which is not within the definition of "goods" in the Sale of Goods Act 1979, even although the definition merely says that the word includes all corporeal moveables except money. On this view an undivided share in goods would be incorporeal moveable property transferable by assignation intimated to the co-owners, if any. It seems more likely, however, that an undivided share in goods was

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1 See Merchant Shipping Act 1988 s18. There can be up to 64 registered owners of a vessel under the Act.

2 See eg Van Cutsem v Dunraven [1954] CLY 2998.

3 Cf Family Law (Scotland) Act 1985 s25 (presumption of equal shares in household goods).

4 Benjamin's Sale of Goods (3rd edn 1987) paras 80 and 119. Chalmers, Sale of Goods (18th edn, 1981) p166. In Scots law there has never been any doubt that there can be a sale of a pro indiviso share of heritable property and there is no reason why there should be any different rule in the case of moveable property. If, for example, Mr and Mrs A own their house and furniture in undivided equal shares (as is very common), and if Mr A is moving out and Mr B is moving in, there is no legal reason why Mr A should not sell his half share in the house and his half share in the furniture to Mr B.

5 The reason for the provision was not doubt about whether there could be a sale of an undivided share in goods. That was clear: Marson v Short (1835) 2 Bing N C 118. The reason was doubt about whether a person could purchase a share in his own goods. Chalmers, Sale of Goods (18th edn 1981) pp78 and 166.

6 Benjamin's Sale of Goods (3rd ed 1987) at para 80 says that this is "uncertain". See also para 119.

intended to be within the scope of the 1979 Act.[1] This is perhaps the natural implication, in its context, from section 2(2).[2] It might do no harm, however, to make this clear in the 1979 Act. If it is assumed that an undivided share - such as a half or a third - of goods qualifies as "goods" under the Act, the next question is whether such a share is "unascertained goods". This too is unclear. The difficulty in saying that, say, a one third share in a horse is unascertained goods is that there is no way in which property in the share could pass by sale while the horse is alive. This cannot have been intended. It would be absurd to say, on the one hand, that there can be a sale of a part share in goods such as a horse, ship, painting or table, and, on the other, that property in the part share could never pass without actual division of the goods. Section 16 draws no distinction between goods of this type and goods which could be easily divided. There is, on the other hand, no difficulty in saying that if an undivided share in goods is "goods" then it is identified and agreed on, as clearly as it ever can be while remaining an undivided share, if the goods in which it is a share are identified and agreed on. It is therefore arguable that a fraction of specific goods should not be regarded as "unascertained" for the purposes of section 16. On this view, property would pass, under section 17, when the parties intend it to pass and the buyer would then become owner in common with the other owner or owners, who may include the seller if he has

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[1] See Van Cutsem v Dunraven [1954] CLY 2998 (on the now repealed English-only s4 of the Sale of Goods Act 1893). In the pre-1893 English law, which was codified in the Sale of Goods Act 1893, it had been held that a sale by the owner of a horse of a half share in it was a sale of goods for Stamp Act purposes. Marson v Short (1835) 2 Bing NC 118.

[2] This was even clearer in the Sale of Goods Act 1893 where what is now subsection 2(2) appeared as a mere second sentence in subsection 2(1).

retained a share.[1] A contrary view could, however, be taken and it could be argued that, however inconvenient and absurd the results, an undivided share of specific goods, even if it qualified as "goods", is always "unascertained" for the purposes of section 16. Again, it might be as well if the Act were amended to make its effects clear in these respects.

2.6 If an undivided share of identified goods is within the definition of "goods" in the Sale of Goods Act 1979, and if such a share is not "unascertained" if it is expressed as a fraction, such as a half or a third, of the identified goods, the question arises whether the parties to a sale of, say, 100 tonnes of wheat out of a specified bulk could get round section 16 by framing the contract as one for the sale of $\frac{100}{n}$ of the bulk, where n is the number of tonnes in the bulk at the time of the sale. As $\frac{100}{n} \times n$ is always 100 this would be in practical terms a sale of 100 tonnes but in legal terms it might operate as a sale of an undivided share, the property in which would pass when the parties intended it to. There is, so far as we are aware, no authority on this question.

The practical effects of section 16 in relation to bulk goods

2.7 Section 16, as we have seen, prevents property passing to a buyer who has purchased goods, described by quantity, weight or

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[1] Cf Marson v Short supra. See also Atiyah, Sale of Goods (7th edn 1985) p236. See, however, Goode, Commercial Law (1982) pp157-158 where it is suggested that there cannot be a contract of sale unless the transferor intends to transfer the whole of his interest.

other measure, forming part of a larger bulk. This can have serious effects on the buyer if, before the goods are appropriated to the contract, creditors of the seller claim the goods on the seller's bankrupty or if they arrest the goods in connection with an action against the seller. A few examples will make this clear.

1. P bought 250 sacks of flour from S. The sacks formed an undifferentiated part of a larger quantity of sacks in an independent store. P paid for the 250 sacks and obtained a delivery order for them. P took delivery of 29 sacks but the remaining 221 sacks were still in the store when S was sequestrated. The trustee in the sequestration successfully claimed the 221 sacks, founding on section 16.[1]

2. P bought from S 500 tons of wheat out of 1,000 tons on board the ship Challenger. P paid S. About two weeks later S went bankrupt. Four days later the ship arrived. The trustee in S's bankruptcy claimed the whole 1,000 tons. His claim was successful. No property had passed to P.[2]

3. Thirteen purchasers bought quantities of citrus pellets on English law terms from S, the quantities purchased being parts of a cargo on The Gosforth. S had bought the cargo, but had not paid for it. The unpaid seller to S raised an action for payment against S and arrested the goods on their arrival at Rotterdam. The 13 purchasers objected to the arrestment but the Dutch court found against them. Property in the goods had not passed to them.[3]

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[1] Hayman v McLintock 1907 SC 936. Contrast Broughton v Aitchisons 15 Nov 1809 FC.

[2] Re Wait [1927] 1 Ch 606.

[3] The Gosforth 20 Feb 1985. The 13 purchasers had delivery orders, but no bills of lading, for the goods.

2.8 Another unfortunate consequence of section 16 for the buyer of part of a bulk is that, because property in the goods has not passed to him, he may be unable to sue a third party who has negligently damaged the goods. So far as claims in delict for damage to property are concerned the general rule is that the pursuer must have

> "either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred."[1]

The buyer may, of course, have a contractual claim against a third party who has damaged the goods. That will depend on the circumstances.[2] The buyer of an unascertained part of a bulk will not, however, be able to base a contractual claim on section 1 of the Bills of Lading Act 1855 because that section applies only where property has passed. We consider this problem later.[3]

An alternative solution

2.9 The Uniform Commercial Code ("the UCC") which has been adopted throughout the United States of America, provides in Section 2 - 105 that

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[1] Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785 at p809, approved by the Court of Session in Nacap Ltd v Moffat 1987 SLT 221.

[2] There may be an express contract, or an implied contract (contrast Brandt v Liverpool [1924] 1 KB 575 and The Aramis [1989] 1 Lloyd's Rep 213), or an assignation of rights (cf The Aliakmon [1986] AC 785 at p819; Nacap Ltd v Moffat 1987 SLT 221 at p224) or a jus quaesitum tertio (see para 3.3 below).

[3] See Part III.

"(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measures may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common." (Emphasis added).

As we have seen,[1] the existing law in the United Kingdom may already be the same as Section 2 - 105 of the UCC apart from the words underlined. Section 2 - 105 has, however, the great merit of making the position clear. The words underlined in subsection (4) are the important words. They enable results to be achieved under the Uniform Commercial Code which could not be achieved under the Sale of Goods Act 1979 and seem more in accordance with commercial expectations than our law. We have been interested to note that the Ontario Law Reform Commission recommended adoption of the UCC solution,[2] and that its recommendation has been carried forward into the proposed Canadian Uniform Sale of Goods Act.[3] The Commission referred to the Sale of Goods Act provision that "there may be a contract of sale between one part owner and another" and continued

> "In our opinion, this formulation is too narrow and does not adequately reflect either long established usage in the North American commodities trade, or commercial needs. The clause recognizes that a sale between co-owners falls within the Act, but fails to allude to the position involving

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[1] Paras 2.3 to 2.6 above.

[2] Report on Sale of Goods (1979) Vol I pp44-45.

[3] S2(4).

> the sale of a part interest, including the sale of a part interest in identified fungible goods, to a buyer who has no existing interest in the goods. The status of a contract for the sale of a specified quantity from a larger mass is of particular importance, since grain and other fungibles that are held in common storage for their owners by a warehouseman are sold daily "to an enormous amount". Nevertheless, the English rule still appears to be that no property in the goods passes to the buyer until they have been separated from the larger mass. ... We agree with Williston that the English rule is anomalous, and we recommend the adoption in the revised Act of provisions comparable to those in the Code together with a definition of fungible goods."[1]

We are inclined to agree with the Ontario Law Reform Commission. The English Law Commission, however, in their recent Working Paper on Rights to Goods in Bulk refer to certain difficulties which might arise under a UCC type of solution. These must now be considered.

2.10 The first difficulty mentioned by the English Commission is - "what is the position where the bulk in respect of which the undivided share is held is in fact less than was assumed?" We do not believe that there would be any great difficulty if a UCC type of solution were adopted in Scots law. Suppose that the seller S, thinking that the bulk in a ship or store is 1,000 tonnes, sells 100 tonnes out of the bulk to P. In fact the bulk is only 900 tonnes. If that is the only sale there is no problem. S and P are owners in common, P to the extent of 100 tonnes and S to the extent of the rest, and S has consented in advance to division of the common property by delivery of 100 tons to P, when they would become P's sole property. If S goes bankrupt before appropriation of an actual 100 tonnes to P then P just claims 100 tonnes. The situation which arises when a part-owner of a bulk

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[1] Ibid. The reference to Williston is to Williston on Sales (Rev ed 1948) Vol, sec 155.

goes bankrupt was considered by the Court of Session in Hayman v McLintock.[1] The circumstances of this aspect of the case[2] were that a security holder, Stevenson, had acquired a good security over a number of bags of flour being the whole cargo of flour on a particular ship. These bags were then mixed with other similar bags in a store in such a way that they could not be separately identified.[3] The owner of the other bags became bankrupt and his trustee claimed all the bags in the store. The Lord President treated this claim with scant respect.

> "That is really a sort of new form of alluvium in the person of the trustee which I have never heard of before and the fallacy of it, I think, can be easily tested by supposing for a moment that Stevenson instead of being a security-holder had been merely a third party. There is the bankruptcy, during which Hayman's store is filled with bags apparently belonging to the bankrupt and bags apparently belonging to this third person; and these bags are so inmixed that no one can tell which bags belong to each. If the storekeeper is not in a position to fulfil his contract, that is to say, if he has not bags enough to satisfy his obligation to deliver bags to both the bankrupt and third party, no doubt then a position of some difficulty may arise. But here there is no such difficulty. It is admitted that Hayman has bags enough to satisfy both the claims of the trustee and of Stevenson, and, in the circumstances I prefigured, what would have happened would be that the bags all being the same, a number corresponding to the number held by the third party would be handed to him, and the rest handed to the trustee. I do not think that anyone could suppose that there was any difficulty in that

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[1] 1907 SC 936 at p950.

[2] For another aspect, concerning purchasers of unascertained parts of the bulk, turning on s16 of the 1979 Act see para 2.7 above.

[3] The mixing of indistinguishable goods belonging to different owners brings about common property by commixtion. See Stair II i 37; Scottish Law Commission, Memorandum No 28, Mixing Union and Creation (1976) para 6; Carey Miller, "Does Confusio need to confuse?" 1988 SLT (News) 270.

situation."[1]

2.11 What happens if the seller S, thinking his bulk is 1,000 tonnes when it is actually only 900 tonnes, sells 10 different lots of 100 tonnes each to different purchasers? The one thing that would be clear if the UCC type of solution were adopted in Scotland is that the seller has nothing left. That at least is an improvement on the existing United Kingdom law which leaves all the property in the seller until delivery or appropriation. If the goods are delivered in the usual way (and not e.g. claimed by a trustee on the seller's bankruptcy or arrested by one of his creditors) the position in Scots law under a UCC type of solution would seem to be no more difficult than under the the existing United Kingdom law. Although there would be common property in the goods, all the owners must presumably be regarded as having consented in advance to division by delivery in terms of the respective contracts. That is the whole purpose of all the transactions, but any doubt on this point could be resolved by an appropriate provision in the legislation. In the absence of any agreement to the contrary it would seem to be a question of "first come, first served". The first 9 purchasers to take delivery will get the full quantity contracted for. Property in the actual goods themselves (as opposed to property in an undivided share in the bulk) will pass on delivery, on the assumption that that is when actual goods are appropriated to the contract. The last purchaser will unfortunately find that there is nothing left for him. He has his normal remedies against the seller for failure to deliver. He would

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[1] It is interesting to note that the same solution would be reached under section 7 - 207 of the Uniform Commercial Code which deals expressly with the commingling of fungible goods in a warehouse.

have no remedy against the other purchasers, in the absence of any agreement to the contrary, because they have got no more than they were entitled to. This seems perfectly straightforward. Indeed the position is the same as under the existing law. The common property in the bulk ceases to be important once division has taken place.

2.12 If, in the circumstances mentioned in the preceding paragraph, the seller becomes bankrupt before any of the bulk has been delivered or appropriated to specific contracts and his trustee claims all the goods, the position under a UCC type of solution, if that were adopted in Scotland, would be that the trustee fails. The property in the goods has passed to the purchasers who own the whole bulk as owners in common. Again this seems straightforward and simple, and a much better result than is achieved under section 16 of the Sale of Goods Act. It will be up to the buyers to divide their common property among themselves and to claim against the seller's trustee, as unsecured creditors, in respect of the shortfall. The position is the same as if the seller, by one single contract, had sold 1,000 tonnes to ten purchasers and had then delivered only 900 tonnes.

2.13 The English Commission appear to suggest that, under the UCC type of solution, there might be a problem if the bulk contains more than the seller supposed.[1] We cannot see this. If the seller sells 10 lots of 100 tonnes out of a bulk which he thinks contains 1,000 tonnes but which actually contains 1,100 tonnes then clearly the seller retains the extra 100 tonnes which he had not sold. This result follows even if each buyer is regarded as becoming owner in common of such a share of the bulk as the

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[1] Law Com Working Paper No 112 para 4.9.

weight bought by him bears to the weight of the bulk. $\frac{100}{1100}$ x 1100 is still 100. There can be no question of an "unintended bonus" to the buyers in this situation.

2.14 Finally, the English Commission suggest that there could be problems under the UCC type of solution if part of the bulk is damaged or has deteriorated. Again, we do not see this. If delivery takes place (and if it is assumed that appropriation of particular goods to the particular contracts takes place on delivery) then each buyer will obtain property in the actual goods (as opposed to an undivided share in the bulk) at that point. If his goods are in conformity with the contract and undamaged he has no problems. If his goods are not, then he has his remedies against the seller or, depending on the circumstances, against a third party responsible for the damage. He is in the same position as he is in under the existing law except that, having been part owner from an early stage, he will have less difficulty in suing a third party for damage to the goods.[1] We cannot see any basis, apart from an agreement between the buyers, on which a buyer who has taken delivery of sound, conforming goods could be liable to a buyer whose goods are unsound or not in conformity with the contract.

2.15 The English Commission make the further point that problems become more acute if additions to, as well as deliveries from, the bulk have been made. They give the following example.

> "There might be a purchase on Monday of 100 tonnes out of 1,000 tonnes in a silo for delivery on Friday. On Tuesday, 800 tonnes are delivered from the silo to a third party. On Wednesday, 400 tonnes are added to the silo. On Thursday, the seller goes into liquidation. Between Monday and Wednesday, the seller had made nine further sales each of 100 tonnes out of the supposed 1,000 tonnes."[2]

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[1] See para 2.8 above.

[2] Working Paper No 112 para 4.10.

Is this so difficult? At the relevant point of time, on Thursday, there are 600 tonnes in the silo. These are claimed by the liquidator and by ten purchasers who have each bought, but not received, 100 tonnes. Under the existing UK law the liquidator wins. Under a UCC type of solution the purchasers would own the goods in common. Again it is up to them to divide up their 600 tonnes and to claim against the liquidator as creditors in respect of the shortfall. This seems a better result than that reached by the existing law. If anyone is at fault in this situation it is the seller who has sold more than he had. It seems more equitable that the buyers, rather than the seller's liquidator, should be preferred to what remains in the silo, particularly if the buyers have already paid for the goods.

2.16 It would be possible to confine reform of section 16 to goods for which the purchaser received a bill of lading.[1] Although this would bring the law into line with what Lord McLaren thought it was in Hayman v McLintock,[2] we can see no justification for it. Section 16 causes similar problems in relation to any bulk goods, whether on sea or in the air or on land. It would, in our view, be undesirable to fragment the law on sale of goods by adopting a special rule for goods covered by a bill of lading. Moreover, such a limited reform would do little to help the purchasers of parts of bulk cargoes. In many cases such purchasers will not receive bills of lading, but only delivery orders.[3] It is quite common for the shipper to receive one bill of lading for the whole cargo and to endorse it to an agent of his at the port of arrival. If parts of the cargo are sold while it is at sea the purchasers may then receive delivery orders from the agent. This was what happened in

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[1] Ibid paras 4.11 to 4.13.

[2] 1907 SC 936 at p952.

[3] Only 15% of the traders who responded to the Law Commission's questionnaire, and who bought goods forming part of a larger bulk while they were afloat, always received a bill of lading. Just over 10% said they would always receive a delivery order.

The Gosforth.[1] So a reform confined to goods for which the buyer had received a bill of lading would do nothing to meet the concern caused by that case.

2.17 Our preliminary view is that there would appear to be advantages in amending the Sale of Goods Act 1979 on the lines of the provisions quoted above from the Uniform Commercial Code.[2] We invite views on the following questions.

1. **Should the Sale of Goods Act 1979 be amended to make it clear--**

   (a) **that there can be a sale of an undivided share of specific goods;**

   (b) **that such a sale is a sale of goods for the purposes of the Act, and**

   (c) **that for the purposes of section 16 of the Act such a sale is to be regarded as a sale of specific goods?**

2. (a) **Should the Sale of Goods Act 1979 be amended to provide that where there is a contract for the sale of a quantity of unascertained goods out of an identified bulk of fungible goods by reference to number, weight or other measure, section 16 does not prevent the buyer from becoming an owner in common of the bulk at such time as the property in the goods would have passed to him if they had been the whole of the bulk?**

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[1] See paras 1.2 and 2.7 above.

[2] In spite of the difficulties mentioned by them the English Commission also see advantages in this approach. See Working Paper No 112 para 4.14.

(b) **Would it be necessary to provide that buyers who become owners in common of bulk goods in the circumstances described in paragraph (a) should be presumed to have consented in advance to division of the common property by delivery or appropriation in terms of the respective contracts of sale, or could this be left to be implied from the circumstances?**

Although it relates to a question of drafting which would be best considered at a later stage, it may be of interest to note that fungible goods are defined in the UCC as

> "goods ... of which any unit is, by nature or usage of trade, the equivalent of any other like unit".[1]

A typical example would be grain of a particular description.

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[1] S1-201 (17).

PART III - THE BILLS OF LADING ACT 1855

Introduction

3.1 A bill of lading is a document issued when goods are received on a ship for carriage and normally signed by the master of the ship. It is a receipt for the goods. It also contains a note of the terms of the contract of carriage.[1] It is also a document of title to the goods and can be presented in exchange for the goods at the port of destination. There are various types of bills of lading and in many trades well-known standard forms are used. For the purposes of this discussion paper it is only necessary to mention that an important function of a bill of lading is to indicate the person to whom delivery of the goods is to be made at the port of delivery. The consignee may not be known at the time of shipment and so bills are usually framed in such a way that they are transferable by endorsement.

Transfer of property and bills of lading

3.2 In some of the earlier cases on bills of lading there are dicta to the effect that property in the goods is always transferred by transfer of the bill of lading,[2] but this is inaccurate. Transfer of the bill of lading operates as a constructive transfer of possession of the goods and it depends partly on the intention of the parties and partly on the circumstances of the case whether this brings about a transfer of property. The following are some cases where the property in the goods will not pass on the transfer of a bill of lading.

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[1] It is not necessary for the purposes of this paper to go into the sometimes difficult question of the relationship between the bill of lading and an underlying charterparty.

[2] See e g Barber v Meyerstein (1870) LR 4 HL 317 at p325.

1. The parties do not intend property to pass until payment is made at a later date. The seller has therefore included in the sale contract an effective "reservation of title" clause.[1]

2. The parties intend the transfer of the bill of lading to give the transferee only a security interest in, and not ownership of, the goods.[2]

3. The seller transfers the bill of lading to a merchant acting as his agent who is to present the bill of lading on his behalf at the port of delivery and issue delivery orders to purchasers.[3] There is no intention to transfer property in the goods to the agent.

4. The owner of machinery is shipping it to a lessee overseas. The transfer of the bill of lading to the lessee is clearly not intended to transfer the property in the goods.

5. The property in the goods has already passed to the buyer before the bill of lading is transferred to him.[4]

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[1] Cf The Aliakmon [1986] AC 785; Sale of Goods act 1979, s19(1).

[2] Tod & Son v Merchant Banking Co (1883) 10 R 1009; Sewell v Burdick (1884) 10 App Cas 74; North-Western Bank Ltd v Poynter, Son and Macdonalds (1894) 22R (HL) 1. This case was not referred to in Hayman v McLintock 1907 SC 936 and some of the dicta in that case on transfers of bills of lading in security must therefore be regarded as unsound. See Rodger "Pledge of Bills of Lading in Scots Law" 1971 JR 193.

[3] Cf White v Furness Withy & Co Ltd [1895] AC 40; The Julia [1949] AC 293; The Gosforth 1985, supra para 1.2.

[4] See Delaurier v Wyllie (1889) 17 R 167.

6. The bill of lading relates to unascertained goods, such as 100 tonnes out of a specified cargo of 1,000 tonnes. Here, even if the parties intend property to pass on transfer of the bill of lading, it cannot do so because of section 16 of the Sale of Goods Act 1979.[1]

It is also worth noting in this connection section 19(3) of the Sale of Goods Act 1979 which provides that

> "Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him".

Contractual rights and bills of lading

3.3 In the normal case a bill of lading contains or relates to a contract between two parties - the person who is sending the goods (the shipper) and the person who is to carry the goods (the carrier). The two parties will typically intend to confer on a third party (the consignee or endorsee) who presents the bill of lading at the port of delivery a right to obtain delivery of the goods in good condition. The third party's right to obtain delivery will usually be conditional on the payment of the freight[2] (if not paid in advance) and possibly other charges, such as port dues, mentioned in the bill of lading. Indeed the bill of lading may expressly provide that the consignee or any holder of the bill, by accepting it, agrees to its terms about liability for freight and other charges.[3] The essential basis of a normal bill of lading is therefore a contract between shipper and carrier which is intended

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[1] See paras 2.7 and 2.8 above and The Aramis [1989] 1 Lloyd's Rep 213.

[2] "Freight" is the carrier's charge for carrying the goods.

[3] For an example, see The Aramis [1989] 1 Lloyd's Rep 213.

to confer rights on a third party (the consignee or endorsee), on condition that he assumes certain liabilities under it. This presents no difficulty, or at least ought to present no difficulty, for legal systems which, like Scots law[1] or many continental European systems,[2] recognise that a third party can acquire rights under a contract. Indeed, the very first example of a stipulation in favour of a third party given in one well-known French textbook is the stipulation in favour of the consignee in a contract of carriage.[3] However, the typical bill of lading situation did present difficulty for English law, because of the doctrine of privity of contract, and this difficulty led to the Bills of Lading Act 1855. To appreciate the need for the Act, and its main purpose, it is necessary to consider a few of the cases which preceded it.

> In Sanders v Vangeller[4] goods were consigned under bills of lading providing for the payment of freight on delivery. The bills were endorsed to endorsees who obtained the goods without paying the freight. The carrier then raised an action against the endorsees for the freight. He failed because he could not rely on the original contract, in relation to which the endorsees were third parties, and no

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[1] On the ius quaesitum tertio in Scots law see Stair, I, 10, 5; Smith, Studies Critical and Comparative, 183; Cameron, "Jus Quaesitum Tertio" (1961) JR 103; Rodger, 1969 JR 34; McCormick, 1970 JR 228; Walker, Contract paras 29.11 to 29.16; McBryde, Contract Chapter 18. The leading modern case is Carmichael v Carmichael's Exrx 1920 SC (HL) 195 which concerned a contract between A and an insurance company for the benefit of A's son.

[2] See e g The French Code Civil, art 1121; the West German BGB s.328 and generally Zweigert & Kötz, An Introduction to Comparative Law (2nd edn 1987) Vol II pp142-156.

[3] Carbonnier, Droit Civil 4, Les Obligations, para 57 "La stipulation pour autrui. A fait promettre à B une prestation en faveur de C. Ex. - l'expéditeur d'une marchandise stipule du transporteur qu'il la remettra au destinataire; un père de famille stipule d'une compagnie d'assurances qu'à sa mort, elle versera un certain capital à ses enfants."

[4] (1843) 4 QB 260.

new contract between him and the endorsees had been proved. A similar decision was reached in Young v Moeller in 1855:[1] no new contract was proved and the endorsee could not be sued on the orginal contract. These two cases, therefore, revealed one problem caused by rigid adherence to the doctrine of privity of contract: the endorsee was not liable under the bill of lading even if he had accepted it and obtained delivery of the goods under it.

The case of Thompson v Dominy[2] illustrated another more obvious problem. A bill of lading was granted for a cargo of oats and transferred to an endorsee. The carrier delivered some of the oats to the endorsee but refused to deliver the rest. The endorsee raised an action claiming breach of contract and founding on the bill of lading. It was held that he could not do so. The endorsement of a bill of lading "transfers no more than the property in the goods; it does not transfer the contract".[3] Counsel argued that "as far as regards the convenience of merchants, it would be better to allow the assignee to bring the action in his own name; and what reason is there why it should not be brought?" to which Parke, B replied "Because it was never brought before, and it is nowhere said that a contract is transferable; on the contrary, by the law of England a chose in action is not transferable ...."[4]

The Bills of Lading Act 1855

3.4 The results reached in these cases were manifestly inconvenient and the Bills of Lading Act 1855 was passed to effect a cure, or at least a partial cure. The preamble stated that

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[1] 5 E and B 755.

[2] (1845) 14 M & W 403.

[3] Ibid per Parke B at p407.

[4] Ibid at p407. Scots law was quite different. See Stair, II, 1, 16; Fraser v Duguid (1838) 16 S 1130. The courts of equity in England were more flexible than the common law courts and s25(6) of the Judicature Act 1873 (now s136 of the Law of Property Act 1925) eventually allowed assignment of a legal chose in action.

> "Whereas, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such rights should pass with the property ..."

Section 1 then provided that

> "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Section 2 provides that the transfer of liabilities to the consignee or endorsee is without prejudice to the shipper's liability. There has been some doubt about the proper interpretation of the phrase "upon or by reason of such consignment or endorsement". In order to give the Act a wider effect it has been suggested from time to time that these words should be applied loosely so as to cover any case where the property passes from the shipper to the consignee or endorsee under a contract in pursuance of which the bill of lading is endorsed in his favour.[1] This wider interpretation seems, however, to depart from the words of the Act quite considerably and it seems doubtful whether a buyer of part of bulk goods acquires property "by reason of the endorsement" of a bill of lading to him if property actually passes to him by reason of a contract for the sale of unascertained goods followed by the

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[1] See Sewell v Burdick (1884) 10 App cas 74 at p105; The San Nicholas [1976] 1 Lloyd's Rep 8 at p13; The Elafi [1981] 2 Lloyd's Rep 679 at p687; The Sevonia Team [1983] 2 Lloyd's Rep 640 at 643. It is a remarkable fact that this very important question of construction has never been authoritatively decided since the Bills of Lading Act was passed in 1855. All of the dicta referred to are obiter.

delivery of goods to him.[1] It also seems difficult to argue that property passes "upon or by reason of such consignment or endorsement" if it has already passed before the goods are put on board.[2] In any event, even this wide interpretation is of no help in bringing endorsees into the contract if property never passes to them at all - e.g. because they have only a security interest in the goods, or because there is an effective reservation of title clause.

Defects of the Act

3.5 The main defect of the 1855 Act is clearly that the conferring of rights to sue under the contract, and corresponding liabilities, is linked to the passing of property. As we have seen, there are various situations where property does not pass on or by reason of the transfer of a bill of lading. Yet in all of these situations the commercial intention and expectation is that the contract will vest a legal right to obtain delivery of the goods under the contract, on fulfilling any conditions specified in the contract, on the consignee or endorsee who presents the bill of lading for delivery of the goods. This defect in the Act has forced endorsees who do not have property in the goods (e.g. because their right is only in security, or because there is a reservation of title clause, or because they have bought unascertained goods) to try to persuade the English courts that a contract between them and the carrier, on the same terms as the bill of lading, could be implied from the facts surrounding the presenting of the bill of lading and the acceptance of the goods. They have had only limited success, and it is clear that the device of an implied

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[1] See The Aramis [1989] 1 Lloyd's Rep 213.

[2] See Delaurier v Wyllie (1889) 17 R 167; McKelvie v Wallace [1919] 2 Ir R 250.

contract between carrier and consignee or endorsee is not an adequate answer to the weakness of the 1855 Act.[1] It is a question of fact whether a contract can be implied and in many cases the facts will not support the implication. English commentators have criticised the linkage in the Act between the passing of the property and the transfer of the relevant contractual rights and obligations,[2] and in The Aramis Bingham L J said that the 1855 Act was not well-adapted to the modern prevalence of undivided bulk cargoes and that the remedy for this situation was not the implication of contracts where the grounds for such implication did not exist but an amendment of the Act.[3]

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[1] See The Aramis [1989] 1 Lloyd's Rep 213 where the cases are reviewed. One case where a contract was implied was Brandt v Liverpool Steam Navigation Co Ltd [1924] 1 KB 575.

[2] See Carver, "On some defects in the Bills of Lading Act 1855" 6 LQR 289 (1890) at p293 ("The amendment of the Act which is needed...is to make the transfer to an indorsee of the rights and liabilities under the contract accompany the right to have possession of the goods, instead of 'the property in the goods'."); Reynolds, "The significance of tort in claims in respect of carriage by sea" 1986 LMCLQ 97 at pp100-104; Benjamin's Sale of Goods (3rd edn 1987) para 1456 ("One can only regret the fact that the Act linked the transfer of contractual rights, and the imposition of contractual liabilities, so closely to the passing of property"); Goode, "Ownership and Obligation in Commercial Transactions", 103 LQR (1987) 433 at p459 ("The need to rely on equitable assignment and the slightly cumbersome procedure associated with it can, of course, be reduced by amending section 1 of the Bills of Lading Act so as to confer a right of action against the carrier on the holder of the bill of lading, whether or not he has acquired the property in the goods.")

[3] [1989] 1 Lloyd's Rep 213 at p225.

The effect of the Act in Scots law

3.6 The 1855 Act applies to Scotland as well as England and Wales and there are dicta to the effect that the Act was as necessary in Scotland as in England.[1] These dicta appear to overlook the point that Scots law never had a strict doctrine of privity of contract and that, at least since the time of Stair, it has recognised not only that contracts can be assigned but also that a contract can confer rights on a third party which he can enforce by action.[2] As we have seen, there were two lines of cases in the pre-1855 English law which illustrated the need for the Act - one concerned with the consignee's or endorsee's liability for freight under the bill of lading where he had obtained delivery of the goods without paying freight, and the other concerned with the consignee's or endorsee's right to sue on the contract for breach of the carrier's obligation to deliver. So far as the first point is concerned, there appeared to be no doubt in the pre-1855 Scots law that a consignee or endorsee who was taken liable for freight in a bill of lading could be sued for the freight if he had taken delivery of the goods without payment of it, although the consignee's liability did not affect the shipper's liability.[3] So there was no need for the 1855 Act in order to make consignees or endorsees liable for freight under bills of lading. So far as the second point is concerned, we have been

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[1] Craig & Rose v Delargy (1879) 6 R 1269 at 1274; Delaurier v Wyllie (1889) 17 R 169 at p192; R Hunter Craig & Co v E Ropner & Co (OH) 1909, 1 SLT 41 at 43.

[2] Stair I, 10, 5. There appears to be no basis in principle or authority for Gloag's view (Contract, 2d edn 1929, p239) that the third party can sue for non-performance but not inadequate performance of the obligation. See Smith, Studies Critical and Comparative, pp193-196; Walker, Principles of Scottish Private Law Vol II (4th edn 1988) p127; Scot Law Com Memorandum No 38, Constitution and Proof of Voluntary Obligations: Stipulations in Favour of Third Parties (1977)

[3] See Laing v Finlayson (1805) Hume 313; Bennett v McNaught Dec 15, 1820 FC; Kelting v Jay (1823) 2 S 121; Pillans & Co v Pitt (1825) 4 S 350.

unable to find any case directly in point, but it is hard to believe that a Scottish court would have denied a consignee or endorsee an action on the contract for non-delivery by the carrier. There would have been no reason to do so. The carrier would have been under a clear obligation to deliver to the consignee or endorsee presenting the bill of lading,[1] and that obligation would have been legally enforceable by the consignee or endorsee. The difference in the underlying pre-1855 laws in England and Scotland was noted by Lord Trayner in Delaurier v Wyllie.[2] His observations, although he was in a minority as to the actual decision of the relevant part of the case,[3] are worth quoting at length.

> "I said in my former opinion, and I repeat, that in my view the provisions of the Bills of Lading Act have no bearing upon this case. Before that Act was passed, the indorsation of a bill of lading in England carried the property therein mentioned to the indorsee, but no right of action as on the contract of affreightment which the

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[1] See Bell's Commentaries on the Law of Scotland (5th ed 1826) 198. "The nature of the shipmaster's contract is, that he binds himself to deliver to the holder the goods shipped, and to hold those goods for him who shall, by indorsation, acquire right to the bill of lading. No intimation, therefore, is necessary to convert the possession, but the delivery of the document, upon the sight of which the shipmaster is bound to give up the goods, and without which he cannot be forced or entitled to do so, transfers at once the right and the civil possession."

[2] (1889) 17 R 167 at pp186-187.

[3] The decision turned on whether the terms of the bill of lading or the terms of the charter-party applied to a cargo of iron. The majority held that the shippers on entering into the charter-party were agents for the consignees, who already owned the iron, so that the bill of lading was a mere receipt and not a separate contract. There was only one contract and it was contained in the charter-party.

indorser could in his own name enforce. This limitation of the effect of an indorsement proceeded, as I understand, on the rule that the legal effects of a contract were confined to the contracting parties (Pollock on the Principles of Contract, 2d ed. p. 192) a rule which went so far as to determine that "so far as any common law right of action is concerned, a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may" (ibid., pp. 196-199). In equity it appears to have been otherwise, for there "the right of the assignee to sue in his own name has been recognised" (ibid., p. 202). Now, in Scotland the distinction between rights at common law and in equity did not exist; and so far as I know, no more did the rule that the assignee of a right under contract could not enforce the contract in his own name. The contract of affreightment in a bill of lading was never treated exceptionally; and in my view, the holder of a bill of lading, in right thereof by indorsement, always had (apart from the Bills of Lading Act altogether) not only the right to the property, but all the rights of action necessary, as on the contract, and in his own name as indorsee, to enforce whatever claim the contract entitled him to make. I know that a contrary view is stated in the case of Delargy (6 R. 1274). I heard it stated in that case for the first time; but I dissent very respectfully from the law there laid down, and should be prepared, if that case came to be reconsidered, to shew reason for my dissent beyond what I have already said."

3.7 Although there are conflicting dicta on the subject [1] it is certainly arguable as a matter of principle that the 1855 Act was

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[1] See the cases cited in the preceding paragraph.

not, and is not, necessary in Scots law.[1] There is no reason in Scots law why the parties to a contract for the carriage of goods should not confer rights on a third party to obtain delivery of goods under the contract on condition of assuming certain liabilities under the contract. There is no reason why the third party should not sue or be sued accordingly. To confine title to sue to the shipper would indeed seem artificial in Scots law because he will often have no interest, having sold the goods, obtained his money and ensured that risk has passed to the buyer. The last thing he would wish would be to become embroiled in litigation about a transaction which, so far as he is concerned, is completed.

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[1] In the article on "Carriage by Sea" contributed by Lord Normand and Lord Sorn to Green's Encyclopaedia of the Laws of Scotland Vol 3 the authors begin their treatment of the 1855 Act at pp54-55 by saying that "Owing to a curious technicality of English law, although the property in the goods specified in the bill of lading passed to the onerous indorsee, the contract with the carrier, of which it was the evidence, was not transferred." They do not discuss further the position in the pre-1855 Scots law. Gloag on Contract (2nd ed, 1929) refers to the English common law rule at p225 and says "the common law of Scotland is doubtful". In McLean and Hope v Munck (1867) 5 M 892 at p902 Lord Neaves was prepared to assume that in Scots law ("though it has been doubted in England") the indorsee acquired "a right to the contract of affreightment of his cedent". He did not refer to the 1855 Act but based his opinion on "solid principles of general law" (p903).

Options for reform

3.8 That the 1855 Act is defective is clear. It is less clear what should be done about it so far as Scots law is concerned. There are various options.

3.9 **Repeal 1855 Act for Scotland.** It would be possible to repeal the 1855 Act for Scotland. This would be logical given that the underlying common law enables the parties to achieve the results they wish by contract. However, we doubt whether this would be the best option for reform. The common law on third parties' rights under contracts is not well developed. It does not rest on statute but on statements by institutional writers and decisions by judges which have given rise to much academic debate. There are no reported cases in which the application of the doctrine to contracts for the carriage of goods has been considered. There are, as we have seen, ill-considered dicta to the effect that the 1855 Act was as necessary in Scotland as in England. It would be confusing to repeal the 1855 Act and put no statutory provision in its place.

3.10 **Add a saving clause for Scotland.** It would be possible to add to the 1855 Act, either as it is or with a minor amendment relating to bulk goods as suggested by the Law Commission for England and Wales,[1] a provision to the effect that nothing in it should prejudice any right which a third party has to sue under a contract in Scots law.[2] This would have several advantages. It would not disturb the 1855 Act unnecessarily. It would realistically recognise that the 1855 Act has given rise to very little litigation in Scotland. It would keep the statute law on bills of lading very largely the same throughout the United Kingdom. Yet it would

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[1] See para 3.12 below.

[2] For examples of this type of saving provision for special rules of Scots law, see the Sale of Goods Act 1979, ss52(4), 53(5) and 62(5).

point readers in the direction of the Scottish common law on third party rights should a case involving the application of the Act in Scots law come up again. It would therefore cancel out the dicta referred to above and would remind consignees or endorsees who did not have property in the goods, for whatever reason, that they could sue under the contract at common law. On the other hand the objection to the first option also applies to some extent here: it might not be regarded as sensible to direct commercial people and their advisers into an area of the law turning on the statements of institutional writers, and on cases on other matters, such as bonds and insurance policies, when their needs could be served by a clear statutory provision.

3.11 **Amend Sale of Goods Act.** Another option would be to amend the Sale of Goods Act 1979, as suggested earlier in this paper, and leave the Bills of Lading Act as it is. This would appear to do something to help the purchasers of parts of bulk goods. It would, however, be unsatisfactory for two reasons. First, it might not actually help purchasers of parts of bulk goods. If, for example, they received only an undivided share in the bulk, becoming owners in common, it would still be arguable that property in the actual goods covered by their bills of lading passed, at the earliest, when the goods were appropriated to the contract, normally on delivery. Their contractual rights under the bill of lading would relate to delivery of the actual goods covered by it and not, obviously, to an undivided share in the bulk. Secondly, this solution would do nothing for other consignees or endorsees who are unable to sue at present on a bill of lading because they do not obtain property in the goods. It would not help security holders, for example, or those affected by a reservation of title clause.

3.12 **Amend Act for bulk goods.** The Law Commission have, in their Working Paper on Rights to Goods in Bulk, invited views as to whether the law of England and Wales should be amended to provide for the buyer of part of a bulk to acquire rights and liabilities under the contract of carriage.[1]

> "Such an amendment might be to the effect that, where the property in the goods would have passed upon or by reason of consignment, or endorsement of the bill of lading, but for the fact that the goods to which the bill related were part of a larger bulk, the consignee or endorsee should have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. A person who bought a bill of lading relating to an unascertained portion of a larger bulk would therefore have all the contractual rights and liabilities given by the bill."

This solution, while it might help purchasers of parts of bulk goods, would be a very limited response to the weakness in the 1855 Act. It would address a symptom rather than the underlying cause. Like the last solution mentioned, it would do nothing for consignees or endorsees who, for other reasons, did not obtain property in the goods as required by the Act. It would not help endorsees holding bills of lading in security or endorsees who acquired no property in the goods because of a reservation of title clause.

3.13 **Recast the 1855 Act.** The most obvious remedy for the defect in the 1855 Act is to break the unnecessary link between rights under the contract and the passing of property. There is no such link in recent international conventions on the carriage of

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[1] Para 4.24.

goods by road, rail or air. Thus Article 13 of the Convention on the Contract for the International Carriage of Goods by Road[1] provides as follows:-

> "1. After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods is established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.
>
> 2. The consignee who avails himself of the rights granted to him under paragraph 1 of this article shall pay the charges shown to be due on the consignment note, but in the event of dispute on this matter the carrier shall not be required to deliver the goods unless security has been furnished by the consignee."

Similarly, the Convention concerning International Carriage by Rail[2] provides in Article 28 that

> " 1. The railway shall hand over the consignment note and deliver the goods to the consignee at the destination station against a receipt and payment of the amounts chargeable to the consignee by the railway.
>
> Acceptance of the consignment note obliges the consignee to pay to the railway the amounts chargeable to him.
>
> 4. After the arrival of the goods at the destination station, the consignee may require the railway to hand over the consignment note and deliver the goods to him.

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[1] Given the force of law in the United Kingdom, in cases to which it applies, by the Carriage of Goods by Road Act 1965 (which contains the terms of the Convention in the Schedule).

[2] Given the force of law in the United Kingdom by the International Transport Conventions Act 1983. The Convention is published in Cmnd 8535 (1982).

If the loss of the goods is established or if the goods have not arrived on the expiry of the period provided for in Article 39, s1, the consignee may assert, in his own name, any rights against the railway which he may have acquired by reason of the contract of carriage."

Article 54 makes specific provision for the consignee to be able to bring, against the railway, actions arising from the contract of carriage.

In relation to international carriage by air the Warsaw Convention, as amended, provides as follows.[1]

"Article 13

(1) Except in the circumstances set out in the preceding Article,[2] the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage set out in the air waybill.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

(3) If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carried out the obligations imposed by the contract."

[1] Carriage by Air Act 1961, Sch 1 as substituted by Carriage by Air & Road Act 1979.

[2] This deals with cases where the consignor exercises his rights to stop or divert the cargo.

3.14 The rules of these international conventions on the carriage of goods by road, rail or air reflect the continental European approach (which is also the Scottish approach) to third party rights under contracts. They allow the consignee to enforce in his own name rights flowing from the contract of carriage, on condition that he pays charges shown to be due in the consignment note or waybill, regardless of whether any property has passed. It seems to us that there would be advantages in recasting the Bills of Lading Act on similar lines. This would solve the problems, noted earlier, which arise when the consignee or endorsee does not acquire property in the goods. It would not impose liability for freight and other charges on intermediate endorsees, or security holders who were not claiming delivery of the goods. At the same time it would preserve the liability for freight and other charges due by a consignee or endorsee under the contract if the consignee or endorsee requires the goods to be delivered to him.

3.15 We would welcome views on the following question.

3. Should the Bills of Lading Act 1855 be

(a) disapplied to Scotland (on the view that it is unnecessary given the underlying Scots law on third party rights under contracts)

(b) supplemented by a provision that nothing in the Act affects any rule of Scots law relating to third party rights under contracts

(c) **amended so as to place purchasers of parts of bulk goods in the position they would have been in had property in the goods passed to them, or**

(d) **recast so as to provide that a consignee or endorsee under a bill of lading may enforce any rights conferred on him under the bill of lading (e.g. to require the goods to be delivered to him) on condition that he assumes any obligations (e.g. for freight and other charges) imposed on him by the bill?**

3.16 Even a recasting of the Bills of Lading Act 1855 on the lines of paragraphs (c) or (d) above would not help the holders of delivery orders. A reform limited to bills of lading would also not help those who seek to enforce rights against warehouse keepers and other independent custodiers of goods under contracts entered into between a person consigning the goods to the custodier and the custodier. We are not aware that the existing law of Scotland gives rise to any problems in these respects, but we would welcome information from consultees.

PART IV - SUMMARY OF QUESTIONS ON WHICH VIEWS ARE INVITED

1. Should the Sale of Goods Act 1979 be amended to make it clear—

   (a) that there can be a sale of an undivided share of specific goods;

   (b) that such a sale is a sale of goods for the purposes of the Act, and

   (c) that for the purposes of section 16 of the Act such a sale is to be regarded as a sale of specific goods?

2. (a) Should the Sale of Goods Act 1979 be amended to provide that where there is a contract for the sale of a quantity of unascertained goods out of an identified bulk of fungible goods by reference to number, weight or other measure, section 16 does not prevent the buyer from becoming an owner in common of the bulk at such time as the property in the goods would have passed to him if they had been the whole of the bulk?

   (b) Would it be necessary to provide that buyers who become owners in common of bulk goods in the circumstances described in paragraph (a) should be presumed to have consented in advance to division of the common property by delivery or appropriation in terms of the respective contracts of sale, or could this be left to be implied from the circumstances?

3. Should the Bills of Lading Act 1855 be

(a) disapplied to Scotland (on the view that it is unnecessary given the underlying Scots law on third party rights under contracts)

(b) supplemented by a provision that nothing in the Act affects any rule of Scots law relating to third party rights under contracts

(c) amended so as to place purchasers of parts of bulk goods in the position they would have been in had property in the goods passed to them, or

(d) recast so as to provide that a consignee or endorsee under a bill of lading may enforce any rights conferred on him under the bill of lading (e.g. to require the goods to be delivered to him) on condition that he assumes any obligations (e.g. for freight and other charges) imposed on him by the bill?

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